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Nov 13 1984	Petition DENIED. Dissenting opinion by Justice Brennan, with whom Justice Marshall joins. (Detached opinion.)

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PETITION FOR WRIT OF CERTIORARI

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No. 83-6809

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

BRUCE H. THOMPSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Appeal from the United States Court of Appeals
For the Eighth Circuit
No. 83-1964 EM

PETITION FOR CERTIORARI - CRIMINAL CASE

KLAMEN & DANNA
DAVID A. GAMACHE, JR.
7820 Maryland Avenue
Clayton, Missouri 63105
(314) 726-1000
Attorneys for Petitioner

Question Presented for Review

Did the Eighth Circuit Court of Appeals err in requiring proof of a general pattern of striking black venirepersons from jury panels in order to prove racially discriminatory government use of peremptory challenges, when there was direct evidence of the government's improper motives in so exercising its challenges in the instant case?

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CONSTITUTIONAL AND STATUTORY PROVISION

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

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v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR CERTIORARI - CRIMINAL CASE

Opinion Below

The opinion of the Court of Appeals below (Appendix p. 13) is reported at 730 F.2d 82 (8th Cir. 1984).

Jurisdiction

The judgment of the District Court below was entered on July 13, 1983. The judgment of the Eighth Circuit Court of Appeals was filed March 30, 1984. Rehearing of the decision of the Court of Appeals was not sought. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Constitutional Provisions and Statutes Involved

1. The Fourteenth Amendment, Section 1, United States Constitution, which provides:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United

States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. The Sixth Amendment, United States Constitution, which provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

3. The statute under which Petitioner was prosecuted, though nothing turns on its terms, was 18 U.S.C. Section 472 (1976), which provides as follows:

> "Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both."

Statement of the Case

The facts necessary to place in their setting the questions now raised can be briefly stated as follows:

A. Course of proceedings in the District Court for the Eastern District of Missouri and in Petitioner's Appeal to the United States Court of Appeals for the Eighth Circuit.

On June 21, 1983, in a cause then pending in the United States District Court for the Eastern District of Missouri, Eastern Division, entitled United States v. Bruce H. Thompson, Criminal No. 83-80CR(B), Petitioner was found guilty by a jury on an indictment of two counts charging violations of 18 U.S.C. Section 472, uttering a counterfeit federal reserve note on October 8th and on October 9th, 1982.

On July 13, 1983, the District Court entered judgment upon a jury verdict and Petitioner was sentenced to five (5) years imprisonment on each count to run concurrently. This judgment and sentence were affirmed by the Court of Appeals for the Eighth Circuit, United States v. Bruce H. Thompson, No. 83-1964 EM, 730 F2d 82 (1984), and a petition to this Court for a Writ of Certiorari thereto is now submitted.

B. Relevant facts concerning the underlying conviction for uttering counterfeit federal reserve notes.

At the start of Petitioner's criminal trial in the District Court, a jury of twelve (12) was selected from a venire panel of thirty-one (31).

There were seven (7) black jurors in the venire panel. The government was allowed six (6) peremptory challenges, and five (5) of them were used to strike prospective black jurors. One (1) of the two (2) remaining black jurors was removed by defense counsel because she was related to a law enforcement officer.

Counsel for the Defendant thereupon requested that the Court either strike the entire jury or that it inquire further of the

Assistant United States Attorney of her reasons for removing nearly all of the black venire persons. A record made at the bench (Appendix p. 9) disclosed that the government struck five (5) of the seven (7) black panellists because the Assistant United States Attorney believed black jurors would be more sympathetic than the others to Defendant's designated black alibi witnesses.

Defendant objected to such a use of the government's peremptory challenges on the ground that it was constitutionally impermissible, but the District Court ruled that the government's reasons were justifiable. (Appendix p. 12).

Defendant, who is black, was tried by a jury of eleven (11) whites and one (1) black.

Existence of Jurisdiction Below

Petitioner was convicted in the District Court for the Eastern District of Missouri of two (2) counts of passing, with the intent to defraud, counterfeit federal reserve notes in violation of 18 U.S.C. Section 472 (1976).

The Court of Appeals has answered an important question of federal law which has not been, but should be, settled by this Court.

This appeal concerns the use by the government of peremptory challenges to strike nearly all prospective black jurors from a venire panel. Defendant objected on the grounds that this was constitutionally impermissible, in violation of the 6th and 14th Amendments.

The numerous opinions on the subject of peremptory challenges vis-a-vis racial composition of a jury, beginning with Swain v. Alabama, 380 U.S. 202 (1965), have had to grapple with the problem

of proving the prosecution's purposeful racial discrimination. Federal Courts, in reviewing such allegations in federal trials, have consistently followed the systematic exclusion analysis set forth in Swain. United States v. Childress, 715 F.2d 1313 (8th Cir. 1983). This has been done by drawing inferences of the prosecution's motives derived from the statistical results of the exercise of those challenges over a period of time. This has been necessary in most instances due to the fact that by their nature, peremptory challenges are exercised without the reasons therefor being placed of record.

That is not an issue in the instant case, because the federal prosecutor openly admitted that her challenges stemmed from the belief that black jurors would automatically be biased in favor of black alibi witnesses. (Appendix p. 10).

Thus, the Swain rationale which presumes the constitutional propriety of the exercise of peremptory challenges by the prosecution is not relevant to the present situation. The question is not in this instance whether or not the prosecutor's reasons for exercising peremptory challenges must be disclosed, but what in fact the trial court should do once it has clear and ambiguous evidence before it of such intentional discrimination.

The law is clear that racial discrimination in jury selection is not acceptable. "Jurymen should be selected as individuals, on the basis of individual qualifications, and not as members of a race." Swain at 204. The "potential for racially motivated

misuse" of the government's challenges should be vigilantly guarded against by the trial courts." United States v. Jackson, 696 F.2d 578 (8th Cir. 1982), cert denied, 103 Sup.Ct. 1531 (1983).

Petitioner submits that the trial court in this instance should have sustained the defense objection to the government's exercise of its challenges in an admittedly racially biased manner. To hold otherwise would be to countenance some overt discrimination in individual cases while awaiting the Swain-mandated statistical evidence of repeated removal of black jurors in numerous cases. It is Petitioner's position that the Swain opinion was never designed to permit evidence of discriminatory intent in the selection of a jury to be ignored, but instead was aimed at establishing a means of proof when it could otherwise only be inferred indirectly from the actions by the prosecution.

Under the facts in the Swain case, the defense could not present any direct evidence of the prosecution's motives in exercising its challenges in that particular case. In response to this set of facts, the Court stated that "[t]he presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the Court. The presumption is not overcome and the prosecutor therefore subjected to examination by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes. . . [w]e have decided that it is permissible to insulate from inquiry the removal of Negroes

from a particular jury on the assumption that the prosecutor is acting on acceptable considerations related to the case he is trying, the particular Defendant involved and the particular crime charged." Swain at 222, 223. Without direct proof of motive, a purposeful pattern of striking black jurors was required by the Court to make a showing that the government's actions were wrongfully and purposefully discriminatory.

The instant case does not present unexplained actions of the government, in that the intent of its actions in making the strikes has been made explicit by the government attorney's own words. The trial court erred in accepting the government's clearly discriminatory reasons for striking the black venirepersons, and the Eighth Circuit erred in imposing the Swain test of systematic exclusion on a situation where the discrimination was patent and not hidden behind the exercise of peremptory challenges without accompanying reasons.

Conclusion

The decision of the Circuit in this case, if allowed to stand unexamined, will lead to the unwarranted result that all questions of the constitutionality of striking black venirepersons will require proof of discriminatory motives by indirect statistical means, even where there is ample direct proof of the prosecution's discriminatory conduct. This would lead to the anomalous result that no single act of discrimination in striking venirepersons, no matter how blatant, would be addressed until it was repeated a

"statistically significant" number of times. The Petitioner submits that the fundamental constitutional protections of the 6th and 14th Amendments should be available at any single instance of provable discrimination, and that prosecutorial abuses should not be given the Court's approval. It is for the above-stated reasons that the Petitioner seeks the review of this Court by a Writ of Certiorari.

Respectfully submitted,

KLAMEN & DANNA

By:_____

DAVID A. GAMACHE, JR. #30534
Attorney for Petitioner
7820 Maryland Ave.
Clayton, MO 63105
(314) 726-1000

EDITOR'S NOTE

PAGES 9 thru 12 WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

THE COURT: These are both case agents. They stay.

MR. DAVIDSON: And secondly, my wife advised me of one point in a case she had in the Eighth Circuit where they have now raised the question when the Government strikes black venire requiring the Government to justify their striking those people.

THE COURT: What?

MR. DAVIDSON: They should state the reason why a substantial number of black venire has been struck.

I know we struck one black venire as well and I would state to the Court that the reason we struck the one venire was that she indicated her brother was in law enforcement.

So the defendant would like either, one, the Government justify their strikes, or, two, to strike the panel.

THE COURT: The panel won't be struck. I'll tell you that.

MR. DAVIDSON: That the Government's action in striking was racially discriminatory, a violation of the Fifth Amendment.

THE COURT: I see that you struck Willie Giles and Lizzie Erby.

MISS HERZOG: That's correct, Your Honor.

THE COURT: What were your reasons for it?

MISS HERZOG: Well, Your Honor, I don't know that that case requires me to give any reasons, but my reasons for

striking both those individuals is the fact that the defendant has indicated there are several alibi witnesses who are going to testify in this case, one of which is an elderly woman who I felt that these people may relate to and sympathize with and both Giles and Erby appeared to be --

THE COURT: And you struck Miss Constance Gray?

MISS HERZOG: Right, Your Honor. I also struck several younger black women for that same reason in that one of the alibi witnesses for the defense is the defendant's sister, a young black female. And there are two other alibi witnesses that are also young black females.

If the Court will note I also struck one white male.

THE COURT: Georgia Hamptiel, she's black, she was.

MISS HERZOG: Yes.

THE COURT: Let the record show that in the case of Swain vs. Alabama which is 380 U.S. 202 on Page 222 the Supreme Court of the United States said in light of the purpose of the peremptory system and the function it serves in a pluralistic society in connection with the institution of jury trial, we cannot hold that the Constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case. The presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court. The presumption is not overcome and the

prosecutor therefore subjected to examination by allegations that in the case at hand all negroes were removed from the jury or that they were removed because they were negroes. Any other result, we think, would establish a rule wholly at odds with the peremptory challenge system as we know it.

In the case of United States vs. Jackson which is 696 Fed. 2d, 578, a case I participated in as a member of the panel of the Eighth Circuit where the same charge was made, the Court held that the prosecutor's office in Kansas City who had been criticized at an earlier time did not violate its constitutional requirements in making strikes.

The defendant Dancy, who is black, first contends that he was denied a fair trial because the trial court permitted unfettered government peremptory strikes of black jurors. This allegation is of concern because of the frequency with which we have been called upon to examine the prosecutor's practices in this regard in the Western District of Missouri. As we have noted, that office's practices raise a serious question because its prosecutors very often strike all or most black persons from serving on juries hearing criminal cases of black defendants.

We have previously suggested that the potential for racially motivated misuse of the government's peremptory challenges might be minimized if the trial court exercises its supervisory powers over the trial of criminal cases by requiring

the prosecutor to discharge his duties in a fair, even, and constitutional manner, and thus ensure that no potential juror is denied the privilege of serving upon a jury solely because of his race.

It is apparent in that case that they did and it is likewise apparent in this case that they did and gave a sufficient reason for exercising their right to peremptory challenges.

(Bench conference concluded)

(Whereupon Miss Herzog presented an opening statement on behalf of the plaintiff and Mr. Camache presented an opening statement on behalf of the defendant.)

THE COURT: Call your first witness.

JAMES STEFFEN, PLAINTIFF'S WITNESS, SWORN

DIRECT EXAMINATION

BY MISS HERZOG:

Q Would you state your full name for the record, please?

A My name is James Edward Steffen.

Q And your occupation or profession?

A I'm a Special Agent with the United States Secret Service currently assigned to the St. Louis Field Office.

Q How long have you been with the Secret Service?

A Approximately 12 and a half years.

Q Agent Steffen, directing your attention to the time period of early October 1982, did you have occasion to become involved in an investigation of counterfeiting activities in the

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 83-1964

United States of America, Appellee, v. Bruce H. Thompson, Appellant.	* * * * * * * * * *	Appeal from the United States District Court for the Eastern District of Missouri

Submitted: January 26, 1984

Filed: March 30, 1984

Before McMILLIAN, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and JOHN R. GIBSON, Circuit Judge.

McMILLIAN, Circuit Judge.

Bruce H. Thompson appeals from a final judgment entered in the District Court[1] for the Eastern District of Missouri upon a jury verdict finding him guilty of two counts of passing, with the intent to defraud, counterfeit Federal Reserve Notes in violation of 18 U.S.C. § 472 (1976). Appellant was sentenced to two concurrent terms of five years imprisonment. For reversal appellant argues that (1) the government's use of peremptory challenges to remove almost all black venirepersons from the jury panel on the basis of assumed racial affinity to designated black alibi witnesses violated his sixth amendment rights; (2) the

[1]The Honorable John K. Regan, United States Senior District Judge for the Eastern District of Missouri.

district court erred in denying his motions to suppress in-court identifications; (3) the district court erred in allowing a Secret Service agent to testify as an expert on counterfeit currency; (4) the district court erred in admitting evidence of other crimes committed by appellant; and (5) the district court erred in remarking to the jury during voir dire that he "ought to know" the names of the two Secret Service agents testifying for the government. For the reasons discussed below, we affirm the judgment of the district court.

In October 1982, the St. Louis City Police Department contacted the United States Secret Service regarding counterfeit bills which were being passed in the St. Louis area. Upon investigation, a Secret Service agent traced one $50 counterfeit bill to a St. Louis gas station and interviewed the cashier of the station on October 22, 1982. The cashier told the agent that she remembered changing the bill for a customer who drove up in a pink Cadillac on the evening of Friday, October 8, 1982, and thinking at the time that something was wrong with the bill. She was able to identify the bill because she had accidentally torn it while handling it and had patched it with cellophane tape. The cashier described the customer as a thin, brown skinned man about 6'2"-6'3". The agent showed her an array of six photographs and asked if she recognized anyone. She picked out a photograph of appellant and identified him as the customer who had given her the $50 bill. She was also shown a photograph of a car and identified it as the car driven by appellant.

Another counterfeit bill, this one a $100 bill, was traced to a flower shop in St. Louis. The proprietor of the shop told the agent at an interview on October 23, 1982, that she remembered the customer who gave her the bill on Saturday, October 9, 1982, in payment for a floral arrangement costing approximately $30. When she took the bill to the bank on the following Monday, the teller told her that it was counterfeit. The proprietor described the customer as a tall, slender built

black man of average complexion with short curly hair. The agent showed her the six photograph array from which she picked two photographs, one of which was of appellant, as possibly being the customer. On March 22, 1983, the proprietor of the flower shop viewed a lineup of five men at the St. Louis Police Department in the presence of defense counsel and made a positive identification of appellant.

Finally, a third counterfeit bill was traced to the shoe department at the Famous Barr department store at Northwest Plaza in St. Louis County. On October 26, 1982, the investigating agent interviewed a salesclerk from the shoe department who told the agent that he and his supervisor had called store security on October 9, 1982, regarding a suspicious bill which had been given to them by two black male customers. Upon looking at the photograph array, the salesclerk recognized the photograph of appellant. The salesclerk also identified appellant at the lineup at the St. Louis Police Department on March 22, 1983.

On April 7, 1983, appellant was indicted for two counts of passing counterfeit bills, based on the gas station and the flower shop incidents. The venire panel consisted of thirty-one persons, seven of whom were black. During voir dire the government used five of its six peremptory challenges to strike black venirepersons. Upon inquiry by the district court, the government stated that it struck these prospective jurors on the basis of the belief that they would be more sympathetic to appellant's designated black alibi witnesses. One of the remaining two black jurors was removed by appellant because of her relation to a law enforcement officer.

At trial, the investigating Secret Service agent testified as an expert witness that the two subject bills were counterfeit. The gas station cashier and the flower shop proprietor, as well as the Famous Barr shoe salesclerk, made in-court identifications of appellant. Another Secret Service

agent, who had been investigating counterfeit activity in Kansas City during October 1982, testified that in the course of his investigation he interviewed appellant several times and that appellant admitted involvement in the Kansas City counterfeit activity and possession of counterfeit bills in the early part of October 1982.

Appellant testified on his own behalf presenting an alibi defense. Four defense witnesses, including appellant's grandmother and seventeen-year-old sister, supported appellant's alibi. The jury found appellant guilty on both counts and this appeal followed.

Appellant's first argument on appeal is that the government's use of peremptory challenges to remove almost all black venirepersons from the jury panel violated his sixth amendment rights. The government's use of five of its six peremptory challenges to remove five of the seven prospective black jurors was based on the assumed racial affinity of these prospective jurors to designated black alibi witnesses. In United States v. Childress, 715 F.2d 1313, 1318 (8th Cir. 1983) (banc), this court reluctantly held that there is no sixth amendment exception to the Supreme Court holding in Swain v. Alabama, 380 U.S. 202 (1965) (evidence that the government used its peremptory challenges to remove all the black prospective jurors from the jury panel in a single case will not support a claim of racial discrimination under the equal protection clause). We were unable to conclude that the sixth amendment guarantee to a venire panel drawn from a fair cross section of the community recognized in Taylor v. Louisiana, 419 U.S. 522 (1975), extended to selections of the petit jury itself. United States v. Childress, 715 F.2d at 1318-20. Contra McCray v. Abrams, No. 83-4406 (E.D.N.Y. Dec. 19, 1983), appeal docketed, No. 84-2062 (2d Cir. Feb. 9, 1984). See also McCray v. New York, 103 S. Ct. 2438 (1983) (mem.) (Marshall, J., dissenting); People v. McCray, 57 N.Y.2d 542, 443 N.E.2d 915, 457 N.Y.S.2d 441 (1982)

(Meyer, J., dissenting), cert. denied, 103 S. Ct. 2438 (1983); People v. Payne, 106 Ill. App. 3d 1034, 436 N.E.2d 1046 (1982), rev'd, 99 Ill. 2d 135, 457 N.E.2d 1202 (1983); People v. Payne, 99 Ill. 2d 135, 457 N.E.2d 1202 (1983) (Simon, J., dissenting); Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499 (state constitutional case using sixth amendment analysis), cert. denied, 444 U.S. 881 (1979); People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978) (state constitutional case using sixth amendment analysis). We thus must rule appellant's first point against him.

Appellant's remaining claims of error warrant little discussion. The investigating agent was clearly qualified to testify as an expert on the counterfeit nature of the bills in question by his knowledge, experience and training. Fed. R. Evid. 702. The statements made by appellant concerning his involvement in the Kansas City counterfeit activity were evidence of other crimes which met all the requirements for admissibility to show intent, preparation, plan, knowledge and absence of mistake under Fed. R. Evid. 404(b). The evidence was relevant to a material issue; the other crimes were similar in kind and close in time to the charged crime; the evidence was clear and convincing and its probative value was not outweighed by its prejudicial effect. See, e.g., United States v. Burchinal, 657 F.2d 985, 993 (8th Cir.), cert. denied, 454 U.S. 1086 (1981). The out-of-court as well as the in-court identifications were admissible. There is no indication in the record that the photographic display and lineup procedures were impermissibly suggestive so as to create a likelihood of misidentification or taint the subsequent in-court identifications. See Manson v. Brathwaite, 432 U.S. 98, 113-16 (1977). Finally, we see no error in the district judge's remark that he "ought to know" the two Secret Service agents' names but did not, which he made while questioning the jury during voir dire whether any of them knew the assistant United States attorney, appellant, defense

counsel or the two Secret Service agents who would testify in the case.

Accordingly, we affirm the judgment of the district court.

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OPPOSITION BRIEF

ORIGINAL

No. 83-6809

Supreme Court, U.S.
FILED
JUN 27 1984
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CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

BRUCE H. THOMPSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the prosecutor exercised the government's peremptory challenges with the purpose of removing black persons from the jury, thereby unlawfully depriving petitioner of a jury drawn from a fair cross section of the community.

1. After a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted on two counts of uttering counterfeit federal reserve notes, in violation of 18 U.S.C. 472. He was sentenced to five years' imprisonment. The court of appeals affirmed (Pet. App. 13-18).

The evidence at trial, which is not in dispute, showed that petitioner passed two counterfeit bills -- a $50 bill the first time and a $100 bill the second -- on October 8 and 9, 1982, in St. Louis, Missouri. He was positively identified by witnesses both before and at trial (Pet. App. 14-16).

In exercising its peremptory challenges during the selection of the jury for petitioner's trial, the government removed five of the seven black persons in the jury venire. Petitioner employed one of his own challenges to strike one of the remaining black jurors (Pet. App. 15). Petitioner then moved to strike the

panel or, in the alternative, that the government be required to state reasons for its peremptory challenges. The government questioned whether it was required to justify its peremptory challenges. Nevertheless, upon inquiry by the district court, the prosecutor explained that she had struck the five prospective jurors because -- in light of their respective ages -- she believed that they would be especially sympathetic to particular alibi witnesses that petitioner planned to call. She also noted that she had struck one white venireman. Id. at 9-10, 15. The district court concluded that the prosecutor had given a sufficient explanation for the government's exercise of peremptory challenges and that the prosecutor had discharged her duties in a fair, even, and constitutional manner, and had not denied any juror the opportunity to serve solely because of the juror's race (id. at 12). The district court accordingly denied petitioner's motion to strike the jury panel.

On appeal, petitioner argued that the government had impermissibly used its peremptory challenges to remove black persons from the jury venire. Relying on its prior decision in United States v. Childress, 715 F.2d 1313 (1983) (en banc), cert. denied, No. 83-5659 (Jan. 9, 1984), the court of appeals held that a claim of systematic exclusion of blacks from jury service is not made out by showing that certain black venire members were subject to peremptory challenge at a single trial (Pet. App. 16-17). The court of appeals did not address the district court's determination that the government's peremptory challenges had not been exercised in a racially discriminatory manner.

2. Petitioner does not challenge the sufficiency of the evidence to establish that he was guilty of the offenses charged, nor does he raise any other argument relating to guilt or innocence. Rather, he contends (Pet. 4-7) that he was denied his Sixth Amendment right to a jury drawn from a fair cross section of the community because the prosecutor exercised the government's peremptory challenges to remove five of the seven

black prospective jurors from the venire at petitioner's trial. But petitioner does not claim that the decision of the court of appeals conflicts with any decision of this Court or any other court of appeals. Moreover, this Court has recently declined to review similar claims in Smith v. United States, No. 82-7013, cert. denied (Oct. 11, 1983), Rickett v. United States, No. 83-5309, cert. denied (Nov. 28, 1983), and Childress v. United States, No. 83-5659, cert. denied (Jan. 9, 1984). There is no reason for a different result here. 1/

a. In Taylor v. Louisiana, 419 U.S. 522 (1975), the Court emphasized that there is "no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition" (id. at 538). And earlier, in Swain v. Alabama, 380 U.S. 202 (1965), the Court held that "the striking of Negroes in a particular case [cannot be held to be] a denial of equal protection of the laws." Id. at 221. The Court suggested that a different rule might apply if an established pattern of systematic exclusion by the prosecution of all black veniremen were demonstrated, but the Court noted that the burden of proof on this issue was the defendant's and that it had not been met. Id. at 222-228.

Following Taylor and Swain, the courts of appeals have uniformly held that, in order to establish a violation of the fair cross-section requirement or a denial of equal protection, a

1/ The Court has also recently declined to review this issue in several state criminal cases. See Gilliard v. Mississippi, No. 82-6775 (cert. denied, October 3, 1983); McCray v. New York, No. 82-1381 (cert. denied, May 31, 1983); Miller v. Illinois, No. 82-5840 (cert. denied, May 31, 1983); and Perry v. Louisiana, No. 82-5910 (cert. denied, May 31, 1983). In voting to deny certiorari in the last three cases last Term, Justice Stevens, joined by Justices Blackmun and Powell, expressed the view that the courts of the states that have chosen to allow inquiry into the basis for the exercise of peremptory challenges should serve as "laboratories in which the issue receives further study before it is addressed by this Court." Petitioner does not suggest that substantial additional experience shedding light on this issue has been gained in the few months that have since elapsed.

defendant must demonstrate a pattern of systematic discrimination; it is not enough to show that individual black jurors were peremptorily challenged at a particular trial. See, e.g., United States v. Whitfield, 715 F.2d 145, 146-147 (4th Cir. 1983); Weathersby v. Morris, 708 F.2d 1493, 1497 (9th Cir. 1983); United States v. Jenkins, 701 F.2d 850, 860 (10th Cir. 1983); United States v. Boykin, 679 F.2d 1240, 1245 (8th Cir. 1982); United States v. Brooks, 670 F.2d 148, 151 (11th Cir.), cert. denied, 457 U.S. 1124 (1982), Braxton v. Estelle, 641 F.2d 392, 395 (5th Cir. 1981); United States v. Greene, 626 F.2d 75, 76 (8th Cir.), cert. denied, 449 U.S. 876 (1980). Indeed, petitioner acknowledges (Pet. 5) that the federal courts have "consistently followed the systematic exclusion analysis set forth in Swain". 2/ The disposition in this case is in accord with that analysis. The court of appeals rejected petitioner's claim because he had asserted only that black veniremen were improperly challenged at his own trial and did not show any pattern of systematic exclusion.

b. Petitioner claims that this case differs from others decided subsequent to Swain, asserting (Pet. 5) that here "the federal prosecutor openly admitted that her challenges stemmed from the belief that black jurors would automatically be biased in favor of black alibi witnesses." The record does not support

2/ In United States v. Childress, the en banc Eighth Circuit recognized that Taylor does not alter the rule, stated in Swain, that prosecutors should not have to account for their use of peremptory challenges. 715 F.2d at 1314-1321. As noted in our briefs in opposition in Rickett v. United States, No. 83-5309, and in Childress, No. 83-5659, we are uncertain as to what practices, if any, the Eighth Circuit intends in the future to require by the concluding passage of its opinion in Childress, which seems to call for some form of judicial supervision of the government's exercise of peremptory challenges (see 715 F.2d at 1321). The court of appeals' decision in the instant case does not clarify the point. The district court did inquire into the basis for the government's peremptory challenges (see pages 1-2 supra). The court of appeals recognized that this explanation had been given (see Pet. App. 16), but did not comment upon the district court's determination that the prosecutor had not employed the government's peremptory challenges in an impermissible manner. See page 2, supra.

this contention. Indeed, the prosecutor's explanations for the government's exercise of peremptory challenges focused upon the proximity in age of various veniremen stricken and particular defense alibi witnesses. See Pet. App. 9-10. It was this justification that the district court determined to be "a sufficient reason for exercising [the government's] right to peremptory challenges" (id. at 12). Even assuming the Court were inclined to reconsider Swain (but see page 3 note 1, supra), this case would afford little occasion for doing so, because the district court found that the government's exercise of peremptory challenges was not racially-based. There is no reason to review that fact-bound determination, which in any event apparently is not necessary to the court of appeals' decision (see page 4 note 2, supra).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

JUNE 1984

OPINION

SUPREME COURT OF THE UNITED STATES

BRUCE H. THOMPSON *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 83-6809. Decided November 13, 1984

The petition for a writ of certiorari is denied.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting from denial of certiorari.

Once again this Court is confronted with a challenge to the constitutionality of the Government's use of peremptory challenges to exclude potential jurors in a criminal trial because of their race. See *Swain* v. *Alabama*, 380 U. S. 202, 221 (1965) ("We cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws.").* The continued vitality of *Swain* is by now a "distressingly familiar" issue to this Court. *Williams* v. *Illinois*, decided with *Dixon* v. *Illinois* and *Yates* v. *Illinois*, —— U. S. —— (1984) (MARSHALL, J., dissenting from denial of certiorari); see *McCray* v. *New York*, decided with *Miller* v. *Illinois* and *Perry* v. *Louisiana*, 461 U. S. —— (1983) (MARSHALL, J., dissenting from denial of certiorari); *Gilliard* v. *Mississippi*, —— U. S. —— (1983) (MARSHALL, J., dissenting from denial of certiorari). A majority of the Court has expressed the position that this question merits plenary review. See *McCray*, *supra*, at —— (Opinion of STEVENS, J., joined by BLACKMUN and POWELL, JJ.); *id.*, at —— (MARSHALL, J.,

*Petitioner Thompson, convicted of federal counterfeiting charges, challenges his conviction on the ground that the Government used peremptory challenges to exclude five of seven Negro potential jurors. When defense counsel raised the objection at the close of voir dire, the Assistant United States Attorney stated on the record that she had used race as a criterion in excluding the five Negro jurors. The district court rejected the challenge on the basis of *Swain* v. *Alabama*, 380 U. S. 202 (1965), and the Eighth Circuit affirmed with some reluctance. 730 F. 2d 82, 85 (1984).

joined by BRENNAN, J., dissenting from denial of certioriari). The call to reconsider *Swain*, from both courts and scholars, continues unabated. It is time for this Court to face up to the issue.

JUSTICE MARSHALL has written persuasively concerning the immediate need to reconsider *Swain* in light of *Duncan* v. *Louisiana*, 391 U. S. 145 (1968) and *Taylor* v. *Louisiana*, 419 U. S. 522 (1975), which found the Sixth Amendment's jury trial guarantees applicable to the states through the Fourteenth Amendment. See *McCray* v. *New York*, *supra*, at —— (MARSHALL, J., dissenting from denial of certiorari); *Gilliard* v. *Mississippi*, *supra*, at —— (MARSHALL, J., dissenting from denial of certiorari). I add my voice here simply to make two points. First, however plausible the rationale of *Swain* may have seemed two decades ago, the justification for shielding peremptory challenges from equal protection scrutiny has not withstood the test of time. *Swain* thus should be reconsidered for equal protection as well as Sixth Amendment reasons. Second, the admirable intent of three of my colleagues in acknowledging the import of the issue but deferring our review "to allow the various states to serve as laboratories in which the issue receives further study," see *McCray*, *supra*, at —— (Opinion of STEVENS, J., joined by BLACKMUN and POWELL, JJ.), has spawned confusion not clarification in the courts below.

I

Swain is an anomaly, a departure from two fundamental principles of constitutional law. The first is the basic equal protection notion that government officials cannot exclude persons from juries solely because of their race. "It is well known that prejudices often exist against particular classes in the community which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection [a jury of peers] which others enjoy." *Strauder* v. *West Virginia*, 100 U. S. 303, 308–309 (1879). The second is the basic notion inherent in the "American tradition of trial by jury" that "[j]ury competence is an individual rather than a group or class matter. That fact lies at the heart of the jury system. To disregard it is to open the door to class distinctions and discrimination which are abhorrent to the democratic ideals of trial by jury." *Thiel* v. *Southern Pacific Co.*, 378 U. S. 217, 220 (1946). Notwithstanding the force of these principles, five members of the Court in *Swain* (of whom I was one) held that the prosecution's right to use peremptory challenges in any particular case involving a Negro defendant had to remain free of equal protection scrutiny. After acknowledging the impressive pedigree of the peremptory challenge, we held that such challenges are frequently

> ". . . exercised on grounds thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty. For the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be. . . . Hence veniremen are not always judged solely as individuals for the purpose of exercising peremptory challenges. Rather they are challenged in light of the limited knowledge counsel has of them, which may include their group affiliations . . . .
>
> "With these considerations in mind, we cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws." 380 U. S., at 220–221.

With the hindsight that two decades affords, it is apparent to me that *Swain*'s reasoning was misconceived. Stripped of its historical embellishments, *Swain* holds that the state may presume in exercising peremptory challenges that only white jurors will be sufficiently impartial to try a Negro defendant fairly. In other words, *Swain* authorizes the presumption

that a Negro juror will be partial to a Negro defendant simply because both belong to the same race. Implicit in such a presumption is profound disrespect for the ability of individual Negro jurors to judge impartially. It is the race of the juror, and nothing more, that gives rise to the doubt in the mind of the prosecutor. Whatever the justification for permitting the idiosyncratic use of peremptory challenges in the run of cases, that justification ought not extend to permit the Government to make use of an unfounded racial presumption that disparages Negroes in this way. Cf. *Palmore* v. *Sidoti*, —— U. S. ——, —— (1984) ("Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category.").

II

In *McCray* v. *New York*, 461 U. S. —— (1983), five members of the Court suggested that *Swain* should be reconsidered. Three of these five went on to suggest a preference for deferring review to permit experimentation in the state courts, presumably in a state constitutional law context, regarding how allegations of race-based use of peremptory challenges should be raised and considered. The decision to defer review has not produced the desired *state law* experimentation in the state courts. See *Gilliard* v. *Mississippi*, —— U. S. ——, —— (1984) (MARSHALL, J., dissenting from denial of certiorari). Instead it has thrown the status of *Swain* as a matter of federal constitutional law into considerable doubt in the lower courts. Some courts appear to have read our opinions in *McCray* as an invitation to depart from *Swain* as a matter of federal law, *e. g.*, *McCray* v. *Abrams*, 576 F. Supp. 1244 (ED N. Y. 1984), while others have declined to depart from *Swain*, *e. g.*, *King* v. *County of Nassau*, 581 F. Supp. 493 (ED N. Y. 1984). Even the courts reaffirming *Swain* have felt compelled to reconsider it at length in light of this Court's *McCray* decision. *Id.*; see also *People* v. *Charles*, 61 N. Y. 2d 321, 462 N. E. 2d 118 (1984). The

piecemeal erosion of *Swain*—whose rule, if without other virtue, was at least clear—will continue until this Court acts to resolve the uncertainty.

III

The time is ripe to reconsider *Swain*. The erosion of *Swain*'s constitutional legitimacy and the dearth of creative state law development counsel against further delay in resolving this important question. Declining to review this case, we let stand a conviction in which we know that the prosecuting attorney excluded individual potential jurors because they were Negroes. This official use of disparaging racial classification is so at odds with our most basic understandings of equal protection that we should not sanction it in this case or any other. I think we have a responsibility to resolve this important and recurring constitutional issue, and I respectfully dissent from this Court's refusal to do so.